

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

CHERNE CONTRACTING COMPANY,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 94-0270-B
	)	
RUST INTERNATIONAL CORPORATION,	)	
	)	
Defendant	)	

***MEMORANDUM OF DECISION***<sup>1</sup>

This is a suit for damages arising out of Great Northern Paper Company's Millinocket Mill modernization in Millinocket, Maine. Plaintiff was the general contractor for the project and Defendant was the engineer. Defendant moves for summary judgment on both counts of Plaintiff's Complaint. As to Count II, for breach of warranty, Plaintiff consents to judgment in favor of Defendant. Count I is a claim for negligence.

***Discussion***

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views

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<sup>1</sup> Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

### *Statement of Facts*

The undisputed material facts relevant to the issues raised in this Motion for Summary Judgment are as follows. Rust International Corporation [”RUST”] entered into an engineering contract dated June 1, 1987 with Great Northern Paper Company [”GREAT NORTHERN”] for services in connection with Great Northern’s Millinocket Mill modernization. As part of its services for Great Northern, Rust prepared for Great Northern’s review and approval engineering documents for the construction of a new system developed by Great Northern for improving its sulfite pulp refining process. This system included a pipeline for conveying pulp from pumps to a storage facility.

As part of its services to Great Northern, Rust generated for Great Northern’s review and approval various specifications for the piping. Rust contacted three leading manufacturers of medium consistency stock pumps and invited quotations/bids for pumps to be incorporated into the project. One of these manufacturers, Kamyr, Inc., was ultimately selected by Great Northern to supply the pumps. Kamyr designed the pumps and specified the size of the pipes to be used. Rust incorporated the pump sizes provided by Kamyr into the specifications for the project.<sup>2</sup>

As part of its services to Great Northern, Rust assisted in the preparation of documents for the competitive bidding process through which Great Northern would select a general contractor for the project. At the outcome of this process, Great Northern selected Cherne Contracting Company

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<sup>2</sup> Plaintiff disputes whether Rust asked Kamyr to specify the pipe sizes, and whether Rust appropriately relied upon Kamyr’s specifications. These disputes are not material to our analysis.

["CHERNE"] as its general contractor. Cherne and Great Northern entered into a written contract dated November 28, 1988. Although Rust was designated the Engineer in the Cherne contract, Rust was not a party to the contract.

Rust finished its engineering documentation and released the project for construction by October, 1988. Construction of the sulfite line was completed and the line was put into operation in the first week of October, 1989. The finished pipeline incorporated Rust's engineering work for the line.

In January, 1990, Rust was notified by Great Northern that the line had failed several times from January 1 through January 9, 1990. At Great Northern's request, Rust investigated the cause of the failures and concluded that they were due to the manufacturing process used by Robert Mitchell Co., Inc., Douglas Brothers Division ["DOUGLAS BROTHERS"], one of Cherne's material suppliers. This finding was presented to Great Northern and Cherne. Neither Great Northern or Cherne expressed disagreement with Rust's conclusions. Indeed, Cherne mounted its own investigation into the pipeline failure and reached virtually the same conclusion. In the final report, it was found that certain calculations made by Kamyr may have caused "pulsing" in the pipeline, by that the pulsing would not have cause a pipeline failure if the pipes had been properly manufactured.

Due to its contractual liability to Great Northern, Cherne replaced the damaged pipeline at a cost of \$342,741.00. Besides the damage to the pipeline, Great Northern claimed economic losses of \$478,509.00, consisting primarily of costs of obtaining substitute product, and Great Northern demanded reimbursement from Cherne. Great Northern and Cherne eventually settled this claim for

\$79,000.00. Cherne has since been paid \$250,000.00 in settlement of its indemnification action against Douglas Brothers.

### ***Legal Application***

Rust first argues that Cherne's negligence claim must fail because the damaged pipeline resulted only in economic loss. The Maine Supreme Judicial Court has now unequivocally adopted the general rule that economic damages are not recoverable in a tort action. *Oceanside at Pine Point Condo. Owners Assoc. v. Peachtree Doors*, 659 A.2d 267, 271 (Me. 1995). These damages are defined as “damages for inadequate value, costs of repair and replacement of defective product, or consequent loss of profits -- without any claim of personal injury or damage to other property.” *Id.* at 270 n.4 (quoting *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 449 (Ill. 1982)).

Cherne counters that the economic loss doctrine applies only to product liability cases, in effect invoking an exception to the economic loss rule which allows recovery for negligent rendering of services. *See, Griffin Plumbing & Heating v. Jordan, Hones & Goulding*, 463 S.E.2d 85, 87 n.1 (S.C. 1995). Although the Maine Law Court has not ruled directly on the exception to the general rule, this Court has had occasion to analyze whether the court would be receptive to the exception. *City of Saco v. General Elec.*, 779 F. Supp. 186 (D. Me. 1991). In *City of Saco*, Chief Judge Carter reviewed recent developments in Maine law, and concluded that a claim for economic loss, where “the economic loss to Plaintiffs was highly foreseeable,” would survive the Law Court's scrutiny. *Id.* at 196.<sup>3</sup>

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<sup>3</sup> That the prediction in *City of Saco* that the Law Court would likely be leery of the “artificial device” of the general rule barring recovery for economic damages proved to be unfounded is irrelevant. *City of Saco* was a negligent provision of services case, and thus fell within the exception, not the general rule.

Nevertheless, we agree with Defendant that Plaintiff has proffered no evidence that Defendant's negligence caused its damages. Specifically, Plaintiff has made no attempt to rebut Defendant's evidence that the cause of the pipeline failure, as previously determined by both Defendant and Plaintiff's investigator, was improper manufacture by Douglas Brothers. Having failed to "make a showing sufficient to establish the existence of an element essential to [its] case, and upon which [it] will bear the burden of proof at trial," *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), summary judgment is appropriately entered for the Defendant.

***Conclusion***

Accordingly, Defendant's Motion for Summary Judgment is hereby GRANTED in its entirety.

***SO ORDERED.***

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Eugene W. Beaulieu  
U.S. Magistrate Judge

Dated at Bangor, Maine on January 10, 1996.